LIBRARY
SUPREME COURT, U. S.

OCT 27 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 769

SKYLINE HOMES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LARRY S. DAVIDOW,
Attorney for Petitioner,
3210 Book Tower,
Detroit, Michigan 48226.

Interstate Brief & Record Co., 356 E. Congress St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

INDEX

	Page
Concise Statement of the Case	4
Opinion of the U. S. Court of Appeals for the Fifth Circuit	3
Proceedings following issuance of Mandate of U. S. Court of Appeals for the Fifth Circuit	2
Relief	21
Statement and Amplification of Questions Presented for Review	6
Statement of the Grounds on which the Jurisdiction of the Court is Invoked	5
Statutory Provisions Upon which Jurisdiction of Court is Invoked	4

TABLE OF CONTENTS OF APPENDIX

Order of Reference	23
Opinion of U. S. Court of Appeals for the Fifth Circuit	27
Respondent's Petition for Rehearing	32

AUTHORITIES CITED

	Page
Constitution of the State of Florida:	
Sec. 12 of Declaration of Rights	12
Constitution of the United States—First Amendment	6
Dallas General Drivers v. N.L.R.B., 355 F 2d 842	20
Indiana Rayon Corp. v. N.L.R.B., 355 F 2d 535	8
International Ladies' Garment Workers Union v. N.L.R.B. and Altman Texas Corp., 366 U.S. 731; 6 L Ed 2d 762	8
Labor Management Act:	
Sec. 7, Title 1(8)	6, 7, 8, 11, 13
Sec. 158(c) (29 USCA)	5
Leonard v. N.L.R.B., 205 F 2d 355	19
N.L.R.B. v. Alva Allen Industries, Inc., 369 F 2d 310	20
N.L.R.B. v. Cactus Petroleum, Inc., 355 F 2d 775	21
N.L.R.B. v. John Brown, et al, 380 U.S. 278; 13 L Ed 2d 839	17
N.L.R.B. v. Herman Wilson Lumber Co., 355 F 2d 426	8, 9, 20
Philip Carey Mfg. Co. v. N.L.R.B., 331 F 2d 720	20
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474; 95 L Ed 456	8, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.....

SKYLINE HOMES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now comes petitioner, Skyline Homes, Inc., an Indiana corporation, by Larry S. Davidow, its attorney, and respectfully shows unto this Court as follows:

REFERENCE TO PROCEEDINGS FOLLOWING THE ISSUANCE OF MANDATE OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On December 2, 1964, the National Labor Relations Board filed its motion to adjudicate Skyline Homes, Inc., in civil contempt and for other civil relief. Skyline filed its answer and brief in opposition to the motion on the contempt charge. Thereafter, on or about February 9, 1965, an Order of Reference was entered by the United States Court of Appeals for the Fifth Circuit appointing Joseph W. Kaufman as Special Master to take testimony and receive evidence with respect to the issues raised by the pleadings, a copy of which Order of Reference is hereto appended on page 23.

Pursuant to the Order of Reference, a pre-trial hearing was had and thereafter, the hearing proper was held in Ocala, Florida, on April 21 and 22, 1965, and stenographically reported.

Thereafter the Report of the Special Master containing recommendations as to findings of fact and conclusions of law and conclusions of law proper, as well as a recommended decree, was filed in the United States Court of Appeals for the Fifth Circuit, which said Report comprising 28 pages and being a part of the record in the proceedings in the Court of Appeals, is made a part hereof by reference.

Objections to the Report and Recommendations of the Special Master were filed on behalf of Skyline Homes, Inc., which are a part of the record in the proceedings in the United States Court of Appeals Fifth Circuit and are made a part hereof by reference.

The NLRB filed objections to the finding of the Special Master that: "However, petitioner's contention that it was contempt to refuse to agree on a recognition clause in a contract, or, for that matter, on any clause in a contract, is rejected. The statutory obligation is to negotiate, not to agree."

The Court of Appeals granted oral argument which took place in the Court House in Jacksonville, Florida, in January, 1966.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On August 11, 1967, the United States Court of Appeals for the Fifth Circuit filed its opinion on the petition of the NLRB to adjudicate Skyline Homes in civil contempt, in which it stated, "The Court substantially adopts the conclusions and findings of the Master. Accordingly, Skyline is adjudged in civil contempt of this Court." (Page 4 of the Opinion). A copy of the Opinion is appended hereto, on page 27.

Skyline Homes, Inc. filed its petition for rehearing, a copy of which is appended hereto on page 32, to which the NLRB made no reply. The Court of Appeals on September 22, 1967, entered an Order, without opinion, denying the petition for rehearing.

STATUTORY PROVISIONS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

Title 28, U.S. Code Annotated, section 1254 (1).

Rule 19 of the Revised Rules of the Supreme Court of the United States, Section 1(b), which provides:

> "Where a court of appeals has rendered a decision *in conflict with the decision of another court of appeals on the same matter;* or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or *has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court;* or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Emphasis ours.)

CONCISE STATEMENT OF THE CASE

Following the denial of the petition for Writ of Certiorari by this Court Petitioner posted the notices required by the Decree of the United States Court of Appeals. It met on two occasions with the Union representatives for the purpose of negotiation, each of which meetings was terminated by the Union. At the last meeting on April 2, 1964, it was agreed that the Union would notify Petitioner's counsel of a date for the next meeting after it had had an opportunity to go into the matter of what it wished to negotiate about. Instead, the Union, on April 6, 1964, sent a letter to Skyline Homes, Inc., breaking off all negotiations unless the company agreed to state in the

written contract that the Union was the exclusive bargaining agent for all of its employes. The employer requested that negotiations continue, the last letter being sent to the Union on May 8, 1964, and a copy to the National Labor Relations Board 12th Region (Exhibit 16 attached to the transcript of the proceedings). No attempt was made on the part of the Union to negotiate following the April 2 meeting, although Petitioner has been ready and willing to resume negotiations at any time requested by the Union; this, even in the face of a claim by counsel representing a majority of the employes that the Union did not represent them. Following this, the employes' counsel filed a charge of unfair labor practice against the employer.

During negotiations with the Union, employer-Petitioner sent letters to its employes advising them of the negotiations that were taking place and of their rights under the Labor Management Relations Act and the Constitution of the State of Florida.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

Petitioner Skyline Homes, Inc. seeks a review of the Order of the United States Court of Appeals Fifth Circuit, adjudicating Petitioner in civil contempt, for the following reasons:

1. The Court's Opinion denies Petitioner its right to legally communicate with its employes, as provided by the Labor Management Relations Act, Section 158(c), Title 29, U.S. Code Annotated, which provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed or graphic, or visual form, shall not constitute or be evidence of an unfair labor practice

under any of the provisions of this subchapter, *if such expression contains no threat of reprisal of force or promise of benefit.*" (Emphasis ours.).

2. The adjudication of civil contempt denied the Petitioner the protection and guarantee of freedom of speech of the First Amendment to the Constitution of the United States.

3. The Opinion of the Court of Appeals is a misinterpretation of Section 7, Title 1(8) of the Labor Management Relations Act, which provides:

> "'Employees shall have the right to self-organization, to form, join, or assist organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except* to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)." (Emphasis ours.)

4. The Court of Appeals' decision is in conflict with opinions of this Court and U. S. Courts of Appeals of its own and other circuits.

STATEMENT AND AMPLIFICATION OF QUESTIONS PRESENTED FOR REVIEW

1. The United States Court of Appeals for the Fifth Circuit in accepting the finding of the Special Master that Skyline "acted in bad faith by sending erroneous and misleading letters to the employes as to the relationship between the union and the employees" has failed to recognize and give effect to the provisions of the Labor Man-

agement Relations Act, Section 7, Title 1 (8) *supra*, which provides:

> "Employees shall have the right to self-organization, to form, join, or assist organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities except* to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (Emphasis ours.)

The Labor Management Relations Act asserts the right of employes to belong or not to belong to a union. The hearing before the Special Master disclosed to the Petitioner for the first time that none of its employes was a member of the Union and, that the Union had never made any attempt to have the employes join the Union, and this condition had existed up to and including the date of the hearing.

The Opinion of the Appeals Court completely overlooks and/or ignores the undisputed fact that while the Petitioner had a good faith doubt as to the Union being the choice of a majority of its employes as their exclusive bargaining agent (particularly after proceedings were taken by the employes through their own counsel for an election, which petition for election was denied by the NLRB), Petitioner learned for the first time at the hearing before the Special Master that (1) none of its employes had ever been a member of the Union; (2) the Union had never sought to persuade any of its employes to join the Union, and (3) there had never been any organizational drive to recruit Petitioner's employes to join the Union. The insistence,

therefore, on the part of the Union and the NLRB on demanding the expression in writing as to the Union being the exclusive bargaining agent of its employes was a direct violation of and in conflict with the decision of this Court in the case of *Int. Ladies Garment Workers Union v. N.L.R.B.* and *Altman Texas Corp.*, 366 U.S. 731; 6 L Ed 2d 762.

2. Petitioner contends that it had the right to send letters to its employes in pursuance of Section 158 (c) *supra*. The Opinion of the Court of Appeals is in conflict with the opinion of the Court of Appeals for the Seventh Circuit in the cases of *Indiana Rayon Corp. v. N.L.R.B.*, 355 F 2d 535; *N.L.R.B. v. Herman Wilson Lumber Co.*, 355 F 2d 426, and *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474; 95 L. Ed. 456.

In the case of *Indiana Rayon Corp. v. N.L.R.B., supra*, the Court of Appeals held that evidence did not support the findings to the effect that employer had attempted to interfere with, restrain or coerce employes through activity of a supervisory employe or in speech or letter by the employer. The Court of Appeals on page 539 said:

> "(4-5) An employer may express himself freely on labor matters *as long as his statements do not contain threats of reprisal or force or promise of benefits.* 29 U.S.C.A. §158(c). Cf. *Sax v. National Labor Relations Board, supra,* at 772-773. Such inferences as appear in the letter and the speech are little more than rhetoric and do not reach the plane of threat or promise. The Board's inferences are scholastic and, we hold, are not supported by substantial evidence." (Emphasis ours.)

And on page 540:

> "Although this evidence of good-faith may be less than overwhelming, the Board in rejecting the trial examiner's conclusion, cited no contrary evi-

dence whatsoever, but instead engaged in sophistry. Because the board concluded that Rayon was guilty of the §8(a)(1) violations discussed above, it reasoned that Rayon was unwilling to permit the question concerning representation to be resolved in a fair election. From this conclusion, it reasoned back that Rayon's refusal to bargain was not made in good faith, but in order to gain time in which to dissipate the union majority.

"(6) Such evidence as the Board has presented in support of its findings of §8(a)(5) violation has been created out of its own findings of §8(a)(1) violations. This self-supporting scaffolding of unfair labor practice findings must all fall together, for the record as a whole does not support the Board's conclusion. There is no substantial evidence that Rayon's refusal to bargain was not a good faith refusal stemming from its disbelief in the union's majority status."

The case of *N.L.R.B. v. Herman Wilson Lumber Company,* 355 F 2d 426, U. S. Court of Appeals Eighth Circuit (1966) was a petition for enforcement of an order upon a finding that respondent had violated Section 8(a)(1) of the Labor Management Relations Act. The Court said that the question then before the Court turned upon the interpretation of the effect of the written documents, "whether or not they can be said to have threatened respondent's employees with reprisal or force if the union had won the election, or, conversely, whether the campaign material is within the protection afforded by §8(c)." (428)

An examination of the handbills and text of the speeches showed that the respondent had stated that it was "not compelled to agree to a union proposal or to make a concession to the union; that it would engage in 'hard

bargaining'; that the only way a union can force your Company to do anything it is unwilling to do would be to pull you out on strike; and that 'if the Union calls an economic strike * * * you can be permanently replaced.'" (429) The president's speech contained the language, "I will fight the union in every legal way possible. * * * If a union wins all it wins is the right to bargain—nothing more * * *. If the union calls an economic strike, you place your job on the line. You can be permanently replaced. You can lose your job. An economic strike could cause us to lose business. This might cause us to have to shut down the plant. If so, you would be without a job." (429)

The Court of Appeals reviewed a number of decisions and quoted from the opinion of the Supreme Court of the United States in the case of *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L. Ed. 456, and on pages 429 and 430 said:

> "'Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."
>
> * * *
>
> "'* * * Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.'"

and on page 432:

> "(5) Inasmuch as respondent did not, in any of the handbills or speeches, state anything more than its legal rights, in an entirely legal manner, we are persuaded to hold that the challenged remarks fall within the protection afforded by §8(c). The conclusion is inescapable that the truthful utterances protected, as they are, by the First Amendment to the Constitution and authorized by §8(c), were improperly interpreted by the trial examiner and a majority of the Board as a basis for authorizing an unfavorable inference. Accordingly, enforcement of the Board's order is denied."

3. The Petitioner had the right to express its opinion as to the possibility of an election, as well as the right of its employes to refrain from any or all of the activities outlined in section 7, Title 1(8) *supra.*

The Petitioner's letters could not possibly have had anything to do with the negotiations that had been going on between it and the Union and were to have continued. The letters had nothing to do with wages, hours or working conditions, the categories to be discussed in the negotiations.

The last negotiation meeting between Petitioner and the Union, held on April 2, 1964, was adjourned at the request of the Union. The Union was to notify counsel for petitioner of a subsequent date for the next meeting, at which time it would present proposals to be discussed, touching upon the categories outlined in the Labor Management Relations Act. It was only after the Union representative met with the officials of the 12th Region of the NLRB and was instructed or encouraged by them, that the letter of April 6, 1964, was sent to Petitioner. There was nothing in that letter concerning the letters which Petitioner had sent to its employees. The April 6th Union letter, inspired

and directed by the N.L.R.B. which created the artificial impasse, was predicated solely upon the specious insistence upon the use of specific language in the contract relating to the recognition of the Union as the sole bargaining agent for Petitioner's employes. It is Petitioner's position that the testimony abundantly sustains its charge that the "impasse" was devised and instigated by the 12th Regional office of the N.L.R.B., to be used as the pretext for initiating contempt proceedings. The Petitioner was justly apprehensive as to this possibility and so expressed itself in a letter to the Union on May 8, 1964, *sequi.*

Section 12 of the Declaration of Rights of the Constitution of the State of Florida provides:

> "Double jeopardy; self-incrimination; eminent domain; right to work—No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. *The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union,* or labor organization; provided that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." (Emphasis ours.)

There can be no question about the fact that the Constitution of the State of Florida contains a "right to work" clause which permits one to work without the necessity of joining any union, and gives the employe the right to either join or refrain from joining any union. The Union representative himself and the Petitioner admitted there was no compulsion to join the Union.

It is the Petitioner's position that the statements contained in the letters sent out to its employes were within the provisions of the Florida Constitution *supra,* as well as the Labor Management Relations Act, particularly Section 7, Title 1 (8).

Section 7 specifically establishes the right of employes to self-organization, to form, join or assist organizations and to bargain collectively through representatives of their own choosing. This section also specifically provides that the employe has the right to refrain from any or all such activities. In other words, it is the contention of the Petitioner that this provision is compelling and positive and certainly means what it says, namely, that any employe has the right to either engage in or refrain from engaging in any of the activities mentioned in said section, including the right to bargain or not to bargain through union or other representatives.

4. Petitioner had the right to express its opinions as guaranteed by the First Amendment of the Constitution of the United States.

5. The Court of Appeals ignored the unchallenged and reasonable explanation of Petitioner's inability to sooner post the notices involved, which was due to the loss of the notices when Petitioner moved its offices. Upon new notices being requested and furnished, they were posted accordingly.

6. The Court of Appeals, in adopting the findings of the Special Master, completely ignored the fact that the Union broke off negotiations with the Petitioner for the reason stated in the letter of April 6, 1964, sent by a Union representative to the Petitioner, as follows:

Skyline Homes, Inc.
P.O. Box 1734
Ocala, Florida

Att.: Mr. Max Miller, General Manager

Dear Mr. Miller:

When you have changed the position that your Attorney, Larry S. Davidow, took at our meeting April 2nd, 1964, in reference to Carpenters Local Union #2292 of Ocala being the exclusive bargaining agent for all your employees, please contact us.

If we do not hear from you we will assume that your refusal to recognize us on April 2nd continues to be your position.

Sincerely yours,
Warren P. Conary, Rep.

As late as May 8, 1964, counsel for Petitioner sent a letter to Warren P. Conary as follows:

Mr. Warren P. Conary
P.O. Box 1518
Stuart, Florida 33494

Re: Skyline Homes, Inc.

Dear Sir:

In replying to your letter of May 4, 1964, acting on behalf of Skyline Homes, Inc., we decline to enter into controversy with you concerning the allegations you have made. The position of Skyline has been fairly stated in a letter sent to you previously, the essentials of which are that Skyline Homes, Inc. has met with you on two different occasions and was and is ready now to meet further in a bona fide attempt to bargain as directed by the National Labor Relations Board in its order. Your failure to honor the agreement made when we last met, on

April 2, 1964, can have only one meaning, namely, an unwillingness on your part to bargain with Skyline Homes, Inc. The willingness to meet and bargain with you still remains, even though we are conscious of the fact that you do not represent a majority of the employes of Skyline and that we are confronted with the dilemma of bargaining with your union under compulsion of the National Labor Relations Board, while exposing Skyline Homes, Inc. to the unfair labor charge already filed by counsel representing the majority of the employes in carrying on negotiations with you in the bargaining process when you do not represent a majority of the employes, and in fact the majority of the employes do not want to be represented by your union.

We do not propose to let you dictate the language of any correspondence on behalf of Skyline Homes, Inc. It is difficult to understand why, with full knowledge of the facts, you would advise at our meeting of April 2, 1964, at Ocala at the Company offices, that you would need time to prepare the precise proposals for negotiations with Skyline Homes, Inc.; that we would be advised by you when you had your proposals ready and since that time you have repudiated the promise and undertaking stated, and now threaten Skyline Homes, Inc. with using the agency of the National Labor Relations Board for contempt proceedings.

The ineluctable conclusion must be that you have never attempted to bargain in good faith with Skyline Homes, Inc., but on the contrary, have sought to manufacture a false claim with which you propose to offer harm to Skyline Homes, Inc.

The tenor of your letter would clearly indicate that whatever advice you have received from whatever source, and which advice you evidently have followed in your communication, was intended to

avoid your embarrassing situation in trying to bargain for employes who do not want you to represent them and creating instead a diversionary situation with which to punish our client.

It is the writer's considered judgment that the blame for no further bargaining is yours and yours alone, and that any assertion to the contrary on your part is wholly without foundation and/or merit.

We suggest that you have some respect for your promises and advise us when you are ready to meet for the purpose of continuing to negotiate or bargain.

Yours very truly,

DAVIDOW & DAVIDOW
Larry S. Davidow

LSD:ny

cc: Mr. Harold A. Boire, Director
National Labor Relations Board 12th Region
Rjetc

7. The Court of Appeals completely overlooked and ignored the undisputed testimony that at the last negotiation meeting of April 2, 1964, the Union representative agreed to fix another date for the next meeting at which it would come up with definite proposals on the subjects to be discussed. This the Union failed to do, and instead, sent the letter of April 6, *supra,* after a conference between the Union representatives and NLRB officials of the 12th Region.

8. The Court of Appeals completely overlooked and ignored the fact that negotiations had been in progress and there was no impasse of any kind until the creation of an alleged impasse based upon the demand of the Union, supported by the NLRB, that the employer agree in the written contract as a preliminary to further meeting, that

it recognized the Union as the sole bargaining agent for its employees. (Letter of Conary, *supra*)

9. The Special Master found: "However, petitioner's contention that it was contempt to refuse to agree on a recognition clause in a contract, or, for that matter, on any clause in a contract, is rejected. The statutory obligation is to negotiate, not to agree." The NLRB filed objections to this finding. The Court of Appeals in its Opinion "substantially adopts the conclusions and findings of the Master". It did not rule on the objections of the NLRB. It must be assumed, therefore, that the finding was accepted. However, the Appeals Court ignored and/or overlooked the fact that the so-called impasse which caused the Union to break off negotiations was its insistence upon a recognition clause in the contract. This insistence was supported by the NLRB, despite the testimony of Union officials that it was not necessary to have a recognition clause in the contract, and was so found by the Special Master.

10. The Opinion of the Court of Appeals is in conflict with the Opinion of this Court in the case of *N.L.R.B. v. John Brown, et al.*, 380 U.S. 278; 13 L Ed 2d 839 (3-29-65), by reason of the fact that by its affirmance of the Special Master's findings, which were inconsistent with and contrary to the facts and testimony adduced at the hearing, it rubber-stamped the Special Master's findings.

In this *NLRB v. John Brown* case, this Court, on page 849 L. Ed. said:

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts

> would abdicate their responsibility if they did not fully review such administrative decisions. * * * Courts must, of course, set aside Board decisions which rest on an 'erroneous legal foundation.'"

11. The Court of Appeals overlooked and/or ignored the perjury committed by Union representative Warren P. Conary in his testimony before the Special Master wherein he testified falsely as to a statement made by Petitioner's counsel in reference to Petitioner's recognition of the Union.

12. There is no basis for the Court of Appeals' finding that the Petitioner restricted "negotiations to 'day-to-day' terms and conditions and thereby excluding other non-economic, but mandatory, subjects of bargaining." There is not a scintilla of evidence or showing to support such a finding.

The Union had agreed to set a date for the next meeting, at which it was to submit proposals on the questions of wages, hours and conditions of employment. These specific fields of negotiation are set forth in the Labor Management Relations Act. Obviously any matters subsidiary to or included in these specific fields would be taken up in the course of negotiation. The Union failed to keep its promise to set another date for the next meeting for negotiations. Matters under discussion never went beyond the insistence of the Union that the employer agree to insert in the written contract that it recognized the Union as the sole bargaining agent for its employes.

13. The Opinion of the Appeals Court ignores the fact that the alleged impasse cutting off negotiations did not occur until after the Union representative had met with the Regional Office of the NLRB following the negotiation meeting of April 2, 1964, between Petitioner and the Union. In this April 2 meeting the Union had asked

for a continuance and had agreed to set another date for a meeting at which it would return with specific proposals on the questions to be negotiated as provided in the National Labor Relations Act. Following a conference of the Union representative and the Regional Office of the NLRB, the letter of April 6, *supra,* was sent to Petitioner, breaking off negotiations. This action of the Regional Office of the NLRB in interfering in the negotiations between the Petitioner and the Union was in violation of the law and decisions of this Court and Courts of Appeals.

The action of the Regional Office of the NLRB was in effect an attempt to coerce the Petitioner to accede to the improper demand of the Union that there be a written acknowledgment in the contract that the employer recognized the Union as the sole Bargaining agent, as a condition precedent to resuming collective bargaining.

In the case of *Leonard v. N.L.R.B.*, 205 F 2d 355, the Appeals Court on page 357 said:

> "As stated by the Fifth Circuit in *N.L.R.B. v. Dorsey Trailers,* 179 F 2d 589, the Board 'is no "Poo Bah" to loose or bind at will.' Congress made it an agency not as a *labor* board—created to aid labor in its struggle against the employer. As shown by its name, Congress created it to be a board concerned with the administration of 'labor relations' in which the rights of the employer are to be as jealously guarded as those of the employee. We repeat the gustatory comment, erroneously attributed to Judge Learned Hand, that the Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act. *Capital Service, Inc. v. N.L.R.B.*, 9 Cir. 204 F 2d 848, 853)."

In the case of *Philip Carey Mfg. Co. v. N.L.R.B.*, 331 F 2d 720, the Court on page 734 said:

> "The General Counsel, like the Board, is charged with the responsibility of representing the public interest, not that of private litigants. When, in the prosecution of a complaint, facts come to his knowledge showing that there was insufficient basis for proceeding thereon, it was his duty to make a motion to amend. *International Union of Electrical, Radio and Machine Workers v. N.L.R.B.*, 110 U.S. App. D.C. 91; 289 F 2d 757, 760; *American Newspaper Publishers Ass'n v. N.L.R.B.*, 193 F 2d 782 (C.A. 7), cert. den., 344 U.S. 821, 73 S Ct 10, 97 L Ed 632."
>
> • • •
>
> "It is appropriate to note here a statement by Judge Friendly in the Superior Fireproof Door case: 'Nor may we forget that the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective representation, rather than of the union itself.' 289 F 2d at 724." (Emphasis ours.)

The Opinion of the Court of Appeals in the case at bar is in direct conflict with opinions of other Circuits, as appears by the cases of *N.L.R.B. v. Herman Wilson Lumber Co.*, 355 F 2d 426, Court of Appeals for the Eighth Circuit; *N.L.R.B. v. Alva Allen Industries, Inc.*, 369 F 2d 310, Court of Appeals for the Eighth Circuit, and with the opinion in the case of *Dallas General Drivers v. N.L.R.B.*, 355 F 2d 842, U. S. Court of Appeals, District of Columbia.

14. The Opinion of the Court of Appeals in the case at bar is in conflict with its own opinion in the case of *N.L.R.B. v. Cactus Petroleum, Inc.*, 355 F 2d 775.

RELIEF

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, and that upon the hearing of said Writ of Certiorari, the action of the Circuit Court of Appeals for the Fifth Circuit affirming the findings of the Special Master and adjudging Petitioner in civil contempt of the Court be reversed and set aside and the petition of the National Labor Relations Board to adjudicate Petitioner in contempt of the Court be dismissed.

Respectfully submitted,

LARRY S. DAVIDOW,
Attorney for Petitioner.